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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 439

W. A. BELCHER, NELL VANDERGRIFT BELCHER, JAMES R. ABERNATHY, JR., AND MARY BELCHER ABERNATHY,
Petitioners

vs.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE RESPONDENT IN OPPOSITION

AL G. RIVES
ERLE PETTUS, JR.
Tenth Floor, Massey Building
Birmingham 3, Alabama
Counsel for Petitioners

RIVES, PETERSON, PETTUS & CONWAY
Tenth Floor, Massey Building
Birmingham 3, Alabama
Of Counsel

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Argument 1

Conclusion 8

Certificate 9

TABLE OF CASES

Atlantic and Gulf Stevedore v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 798 6

Gianfala v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775 8

CONSTITUTIONAL PROVISIONS AND STATUTES

Seventh Amendment, Constitution of the United States 2, 6

Internal Revenue Code of 1939—

Sec. 117 (26 U.S.C.A., 1952 Ed., Sec. 117) 3, 4, 7, 8

Internal Revenue Code of 1954—

Sec. 1221 (26 U.S.C.A., Sec. 1221) 3, 7, 8

Sec. 631 (26 U.S.C.A., Sec. 631) 3, 4

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ARGUMENT

Petitioners file this reply brief to the brief for the respondent in opposition and, for convenience, the points will be designated in the same numerical order as they appear in the argument in respondent's brief.

1. In neither the first nor the extended opinion of the Court of Appeals was there a reference to any waiver by petitioners of their right to a jury trial under the Seventh Amendment of the Constitution of the United States. It is surprising, therefore, that instead of defending the judgment of the Court of Appeals on the grounds stated in the extended opinion of that Court, untenable as they are, respondent District Director now contends that petitioners "waived" their right to trial by jury under the Seventh Amendment of the question of whether timber sold to the corporation by the partnership was held by the partnership primarily for sale to customers in the ordinary course of the trade of business of the partnership. With respect to this particular question, the Court of Appeals stated in its extended opinion:

> "* * * It was either *assumed by the parties that the timber was not held primarily for sale to customers in the ordinary course of trade or business, or either or both parties completely failed to bring this issue to the Court's attention at the time the interrogatories were submitted to the jury.* * *" (Emphasis supplied)

Extended Opinion, Court of Appeals, Appendix, pp. 50, 51.

Petitioners, of course, were incapable of waiving the jury determination of an issue which was not known by either party or by the Court to exist as a contested issue at the time the case was submitted to the jury. The "issue" was not in fact in controversy and it was not tried as a controversial issue in the District Court because it was not made an issue by the pleadings, pre-trial order or evidence.

Pointedly ignoring the answer of the respondent affirmatively defending the determination of the Commis-

sioner that petitioners were entitled to long term capital gain treatment on timber sales, respondent District Director, argues that "the 'sale to customers' issue entered the case on the Director's pre-trial motion for set-off" and that is the sole reliance of respondent in contending that the issue was in the case. (Resp. Brief p. 9) The motion for set-off was filed the day before the commencement of the jury trial, and the complete motion is set forth in the Petition for Certiorari, page 13 *et seq.*, as it appears in the record page 165 *et seq.* The motion is explicitly limited by its terms to the application of Sections 117(k) (2) of the Internal Revenue Code of 1939 or Section 631(b) of the Internal Revenue Code of 1954 to the timber sales. These particular sections are cited by numbe in the motion and each allegation of the motion denying the applicability of the sections refers to "said sections", thereby demonstrating the unmistakable intention of confining the motion to the applicability of the sections cited.

Contrary to respondent's contention, the statement in the motion that the partnership "was engaged, among other things, in the business of selling logs and timber to customers in the ordinary course of its trade or business" does not, directly or indirectly, invoke the question of applicability of Section 117(a) of the 1939 Code or Section 1221(1) of the 1954 Code, and there was neither any allegation in the motion nor later contention in the trial of the case in the District Court that it does so. Had such been the intent, then of necessity the motion would have included the specific statement that the particular timber sold by the partnership to the corporation constituted "property held by the taxpayer primarily for sale to customers in the ordinary course of the trade or business of the partnership". The absence of any such language conclusively manifests the intent of confining the motion to the appli-

cability of Sections 117(k) (2) of the 1939 Code or Section 631(b) of the 1954 code to which it is limited.

Moreover, the foregoing excerpt from the extended opinion of the Court of Appeals recognizes that neither the Court nor the parties considered that the question of "sales to customers" with respect to timber was a controverted issue when the case was submitted to the jury. Both parties, without deviation, proceeded on the theory in trying the case that the holding period of the timber sold by the partnership to the corporation was completely and finally determinative of whether such timber was entitled to capital gain treatment in accordance with the pertinent special interrogatories stipulated in the pre-trial order. Nothing could be a clearer statement of the theory upon which the case was tried by both parties than the Court's instruction to the jury given at the request of the respondent Director that:

> "*Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.*" (Emphasis supplied) (R. 552, 553)

Respondent District Director further argues that the entry of findings of fact and conclusions of law by the District Court as to the capital gains treatment of timber sales is a persuasive indication that the "sales to customers" question survived the jury verdict as a controversial issue. That argument is founded on the fallacious assumption that each finding was made by the Court in connection with a controversial issue at the time the finding was made. That assumption is not so. For example, in the first finding of fact, the District Court found that:

> "1. Belcher Land and Timber Company is a partnership created on August 1, 1946 and at all times

subsequent th[illegible] has been *a valid and subsisting partnership.* * * *" (Emphasis supplied) (Appendix, p. 16)

In early Revenue Agent reports applicable to the years in litigation, the validity of the partnership had been challenged by the Revenue Agents conducting the investigation. However, prior to the commencement of this litigation, this issue had been resolved favorably to the petitioners and accordingly, it was not in controversy when the case was tried. The finding of fact by the Court adverting to the uncontested validity of the partnership did not resurrect that issue as a controversial one.

By the same token, the findings of fact and conclusions of law made by the Court as to the capital gain treatment of timber did not revive that issue as a controversial one, inasmuch as it had been theretofore adjudicated by the jury verdict upon special interrogatories under the issues formulated in the pre-trial order pursuant to the law of the case as contained in the Court's instruction to the jury. It was the jury verdict pursuant to Defendant's Requested Instruction No. 4 which finally adjudicated the amount of timber entitled to capital gain treatment. Conclusion of law No. 4 reads as follows:

> "4. The sales of timber made by the Belcher Land and Timber Company, a partnership to the W. A. Belcher Lumber Company, a corporation, during the years 1950, 1951, 1952, 1954, and 1955, *of timber held for more than six months are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954, as the case may be*". (Emphasis supplied) (Appendix, p. 21)

This statement of the law is the same as that given by the Court at the request of the respondent to the jury reading in part as follows:

DEFENDANT'S REQUESTED INSTRUCTION No. 4
"* * * You will notice from the questions I am going to hand you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. This separation is important because the tax treatment is different. *Timber held for more than six months is subject to capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.* * * *" (Emphasis supplied) (R. 552, 553)

The respondent could not request Defendant's Requested Instruction No. 4 as the law of the case stating that the holding period was the sole criterion for determining capital gains without, of necessity, conceding that the timber was not held primarily for sale to customers in the ordinary course of the trade or business of the partnership. Consequently, the finding of fact of the Court to the effect that the sales of timber made by the partnership to the corporation "were not made of property held primarily for sale to customers in the ordinary course of the trade or business of Belcher Land and Timber Company a partnership" merely indicates affirmative agreement by the Court of the uncontested and conceded premise which was the basis of Defendant's Requested Instruction No. 4 resulting in the holding period as being the only controversial issue to be decided in determining the capital gain treatment of timber. The jury verdict, therefore, finding the amount of timber sold by the partnership to the corporation held over six months thereby established the amount of capital gains to which petitioners were entitled on timber sales and the reversal of the judgment based on that verdict violates petitioners' constitutional right to a jury trial under the Seventh Amendment. *Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 798.

2. Respondent's brief contains a misleading statement reading as follows:

> "In the present case the evidence of record overwhelmingly establishes that the partnership was primarily in the business of selling timber to customers. W. A. Belcher, chief executive officer of both the partnership and the corporation, categorically so stated (Pet. App. 37-38; R. 271, 272)." Resp. Brief, pgs. 12, 13

In the quotation referred to, Mr. Belcher did not categorically state that the partnership was engaged in selling timber to "customers". Mr. Belcher stated that the partnership sold timber to the *single vendee, the corporation,* and he did not state that the partnership was in that business. (Appendix, pgs. 37, 38; R. 271-272)

Respondent also argues with respect to the assertion of petitioners that the sales of timber from the partnership to the corporation were to a single vendee as follows:

> "This contention, however, rests on an erroneous factual premise. The corporation was not the only vendee to which the partnership sold timber." Resp. Brief, p. 12

While it is true that the partnership during the years in question sold a minuscule fraction of timber to others than the corporation, such "other sales" were not involved in this case. The only timber sales involved in the refund suits in the District Court were those from the partnership to the corporation—a single vendee—and so the question for determination by the trier of fact was whether the partnership was entitled to capital gain treatment under Section 117 (a) of the 1939 Code or Section 1221 (1) of the 1954 Code on timber sales to a single vendee.

The earnest endeavor of respondent Director to create the impression of multiple vendees or customers is under-

standable because the statute refers to "customers" in the plural. Nevertheless, the fact is that only one vendee is involved in the timber sales in this case under the Commissioner's determination that sales to such single vendee were entitled to long term capital gain treatment where the timber sold was held over six months. Our position remains that conflicting inferences may be drawn from the undisputed fact that only one vendee is involved and hence it is a matter for the determination of the trier of fact and not an appellate court as to whether such sales are entitled to capital gain treatment under Section 117 (a) of the 1939 Code or Section 1221 (1) of the 1954 Code. *Gianfala* v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted, the judgment of the Court of Appeals summarily reversed and the judgment of the District Court reinstated.

AL G. RIVES
ERLE PETTUS, JR.
Counsel for Petitioners

RIVES, PETERSON, PETTUS & CONWAY
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing reply brief have been mailed in a United States post office or mail box with first class postage prepaid addressed to the Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C., this _____ day of November, 1962.

ERLE PETTUS, JR.
As Counsel for Petitioners